Supreme Court, U.S.
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No. 03-69

IN THE

Supreme Court of the United States

VYTRA HEALTHCARE AND BRENT SPEARS, M.D.,

Petitioners,

v.

BONNIE CICIO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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This petition asks the Court to clarify whether the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, preempts state law claims challenging a non-treating physician's alleged medical judgment used in determining eligibility for coverage under an employee benefit plan. As demonstrated in the petition (Pet. 9-18), there is considerable confusion about this important federal question: Although prior to *Pegram v. Herdrich*, 530 U.S. 211 (2000), at least seven federal courts of appeals had held that ERISA preempts such state law claims, in the wake of *Pegram*, the lower courts have divided into four diverging camps on this issue; and the United States has added to the confusion by publishing its view that, contrary to the decision below, *Pegram* should not be read to countenance such state law claims. As further demonstrated in the petition (Pet. 13, 17-18, 18-22), the extant confusion is having deleterious effects on benefit plans and their participants, and numerous commentators have urged the Court to resolve promptly this tremendously important federal question.

Events occurring since this petition was filed have only confirmed the need for this Court's immediate intervention. Two additional federal circuits have now considered this preemption question and have decided it in opposite ways. *Compare Land v. Cigna Healthcare of Fla.*, 339 F.3d 1286 (11th Cir. 2003) (no preemption), *with Elliot v. Fortis Benefits Ins. Co.*, 337 F.3d 1138 (9th Cir. 2003) (finding preemption). In addition, the Clerk's Office has consolidated this petition with four other petitions raising the same preemption issue, although one petition was recently dismissed by stipulation of the parties. *See Roark v. Humana Inc.*, No. 02-1826 ("*Roark*"), *dismissed by stipulation of parties* (Sept. 18, 2003); *Aetna Health, Inc. v. Davila*, No. 02-1845 ("*Davila*"); *Conover v. Aetna US Healthcare Inc.*, No. 02-1864 ("*Conover*"); *Cigna HealthCare of Texas, Inc. v. Calad*, No. 03-83 ("*Calad*"). A wide variety of interested persons—including 15 state attorneys general, the American

Medical Association, AARP, the American Association of Health Plans, Inc., the U.S. Chamber of Commerce, the American Benefits Council, and the National Association of Manufacturers—have urged the Court to grant one of these petitions and resolve the split among the lower courts. *See* Reply App. 1a-13a (appendix attached hereto, reprinting relevant excerpts of *amici* briefs associated with other petitions for the Court's convenience); Br. of *amici* AAHP 5.

Respondent does not dispute that the petition presents an important federal question and even concedes the conflict between the Second and Fifth Circuits. Ignoring both the acknowledgment by the court below that its decision conflicts with a Third Circuit decision and the contrary views of the United States, however, respondent contends that there is no widespread confusion necessitating this Court's review. Respondent's opposition is without merit.

I. RESPONDENT WRONGLY ASSERTS THAT THERE IS NO CONFUSION ABOUT WHETHER ERISA PREEMPTS STATE LAW CLAIMS CHALLENGING MEDICALLY-BASED ELIGIBILITY DETERMINATIONS.

Respondent's principal argument is that *Pegram* established some "new ERISA jurisprudence" relating to preemption that has been almost uniformly accepted and applied. This argument is flawed at every turn.

First, contrary to respondent's argument (Opp'n 1-2), neither *Pegram* nor *U.S. Healthcare Systems v. Pennsylvania Hospital Insurance Co.*, 530 U.S. 1241 (2000), establishes any new ERISA preemption rules. *Pegram* twice expressly declined to address ERISA preemption, both with respect to the fiduciary duty issue before the Court in that case and with respect to the benefits eligibility question at issue here. *Pegram*, 530 U.S. at 229 n.9 (declining to consider preemption from benefits claim); *id.* at 236-37 (declining to consider preemption from fiduciary duty claim). Moreover,

the Court's summary reconsideration order in *U.S. Healthcare Systems*—which merely vacated and remanded for further consideration in light of *Pegram*—did not establish any new ERISA rules, as such orders are "not a 'final determination on the merits,'" *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001) (quoting *Henry v. Rock Hill*, 376 U.S. 776, 777 (1964) (*per curiam*)), and have no precedential value. *See* R. Stern & E. Gressman, SUPREME COURT PRACTICE 317-20 (8th ed. 2002).

Second, respondent misses the point entirely in suggesting (Opp'n 3-13) that the lower courts have almost uniformly accepted *Pegram*. The issue is not one of acceptance; inferior courts are *required* to do that. The issue is one of understanding and consistently applying *Pegram* in the context of state law claims challenging medically-based eligibility determinations. On this question—which is the question presented for review—the courts and the Executive Branch are hopelessly confused and in substantial disagreement.

The Second Circuit's decision below, which expressly acknowledges a conflict among the courts (Pet. App. 26a-27a, 31a-32a), the publications of numerous legal commentators describing the broad judicial conflict (Pet. 17-18), and the multiple briefs of *amici* urging the Court to resolve the conflict (Reply App. 1a-13a), amply demonstrate the deep judicial conflict. But any careful reading of the various lower court decisions clearly demonstrates the confusion and disagreement that has arisen in *Pegram*'s wake. As respondent inconsistently admits (Opp'n 14), the court below, the Pennsylvania Supreme Court, and the Eleventh Circuit—in a case decided after this petition was filed—have all concluded that state law claims challenging medically-based eligibility determinations are not preempted by either § 502 or § 514 of ERISA, while the Fifth Circuit has held that such claims are preempted by § 514—but not by § 502—of ERISA. *See Land v. Cigna Healthcare of Fla.*, 339 F.3d 1286, 1292-93 (11th Cir. 2003); *Roark v. Humana, Inc.*, 307

F.3d 298, 315 (5th Cir. 2002); *Pappas v. Asbel*, 768 A.2d 1089, 1095-96 (Pa. 2001), *cert. denied sub nom. U.S Health Care Sys. of Pa., Inc. v. Pa. Hosp. Ins. Co.*, 536 U.S. 938 (2002). While respondent attempts to minimize this conflict by suggesting that the Fifth Circuit may reconsider its decision (Opp'n 14), the *en banc* court has already denied rehearing. Indeed, convinced of the finality of the Fifth Circuit precedent, the Attorney General of the State of Texas has asked this Court to resolve the "direct conflict" between the Fifth Circuit's *Roark* decision and the Second Circuit's decision here. Reply App. 10a.

But the conflict goes much further. In contrast to both the Fifth Circuit's partial-preemption approach and the approach of those courts finding no preemption under either § 502 or § 514 of ERISA, the Third, Sixth, Eighth, and Ninth Circuits have held that state law claims challenging medically-based eligibility determinations are preempted under *both* § 502 and § 514 of ERISA. Pet. 13-15. Respondent's attempt to recast the holdings of these courts is error.

Contrary to respondent's claim (Opp'n 10-11), the Third Circuit's decision in *Pryzbowski v. U.S. Healthcare, Inc.*, 245 F.3d 266 (3d Cir. 2001), did not apply *Pegram* like all other courts merely because the Third Circuit "referenced *Pegram* approvingly." This argument is directly at odds with the decision below, which expressly rejected the Third Circuit's analysis of ERISA preemption as "no longer tenable" after *Pegram*. Pet. App. 32a. In contrast to the Second Circuit—which read *Pegram* as "alter[ing] the framework" of preemption analysis (Pet. App. 30a)—the Third Circuit held that *Pegram* merely "suggest[ed] preferable terminology," and otherwise left in place, for purposes of preemption analysis, the distinction between "quality of care" and "benefit eligibility" decisions. *Pryzbowski*, 245 F.3d at 273.

Respondent's attempt to dismiss the Eighth Circuit from the circuit conflict is also in error. Opp'n 13. The Eighth Circuit

held, prior to *Pegram*, that medical malpractice claims are preempted under ERISA where they challenge the medical judgment of a benefits administrator, because it is the plan participant and the participant's doctor that "retai[n] the ultimate decision-making authority regarding . . . medical care." *Thompson v. Gencare Health Sys., Inc.*, 202 F.3d 1072, 1074 (8th Cir. 2000). In *Howard v. Coventry Health Care of Iowa, Inc.*, 293 F.3d 442, 445 (8th Cir. 2002), the court held that *Pegram* did not alter preemption analysis or place eligibility decisions involving medical judgment "outside the scope of ERISA." Thus, even though *Howard* did not, itself, concern a medical judgment (Opp'n 13), it reaffirms earlier precedent that conflicts with the rule of other courts.

Also contrary to respondent's opposition (Opp'n 13), the Sixth Circuit's decision in *Caffey v. UNUM Life Ins. Co.*, 302 F.3d 576 (6th Cir. 2002), conflicts with the decision below. *Caffey* holds that medically-based eligibility determinations are preempted under ERISA. That judgment creates a conflict in legal rule and outcome, whether the opinion expressly discusses *Pegram* or not. For the same reason, the Ninth Circuit's decision in *Elliot v. Fortis Benefits Insurance Co.*, 337 F.3d 1138 (9th Cir. 2003), adds to the conflict. This case, which was decided after the petition in this case was filed, holds that a state law claim challenging a medically-based eligibility determination is "clearly" preempted under § 502 of ERISA. *Id.* at 1147. The decision below is irreconcilable with this holding.

The confusion does not end there, as the Maryland Court of Appeals has adopted an entirely different approach to state law claims challenging medically-based eligibility determinations. That court has held that whether a state law claim challenging a medically-based eligibility determination is preempted by ERISA "is inextricably bound up with the availability of a traditional medical malpractice claim under state law." *Eid v. Duke*, 816 A.2d 844, 852 (Md. 2003). No other court has held that ERISA preemption may vary from

State to State depending on the contours of the State's malpractice law. Respondent attempts to lump the Maryland court's decision together with those of other courts finding no ERISA preemption (Opp'n 9), but in doing so, wrongly ignores the crucial analytical differences between the Maryland court's decision and the decisions of those other courts.

Respondent's suggestion that no confusion exists also ignores that the United States has rejected the Second Circuit's characterization of *Pegram*. Contrary to the court below (Pet. App. 34a), the United States has argued that *Pegram* "addresses only mixed decisions made by treating physicians" and that state law challenges to benefits decisions should be preempted "even if the subject of the decision is 'medical necessity' and the decision-maker is a physician." *Rush Prudential HMO, Inc. v. Moran*, No. 00-1021, 2001 WL 1480556, at *8-*9 (filed Nov. 7, 2001). The United States' position ensures that the controversy in the lower courts will continue.

Finally, respondent errs in suggesting (Opp'n 10-13, 14-15) that the Court should abstain from deciding the question presented until either more courts have addressed the issue or Congress intervenes. As shown in the petition (Pet. 18-22), and the briefs of numerous *amici* (Reply App. 1a-13a), any delay in resolving the split of authority comes at an unacceptably high cost, as "the decision below creates real and immediate operational issues for multistate employee benefit plans that will ultimately harm plan participants." Br. of *amici* AAHP 14. Moreover, according to numerous state attorneys general, delay in resolving the issue hinders "the States' fundamental power to regulate health care." Reply App. 10a-11a. And abstaining in the hope that Congress might intervene is unrealistic and non-responsive. Any legislation on this subject is entirely speculative; and retroactive legislation that would resolve this split in authority

for thousands of pending matters would be contrary to the American legislative tradition.

In sum, contrary to respondent's claims, there is substantial confusion over the important federal question presented. And, as health plans, plan participants, businesses, and States alike have urged, this Court's immediate resolution of the question is necessary.

II. THIS PETITION PRESENTS THE BEST VEHICLE FOR CLARIFYING WHETHER AND HOW ERISA PREEMPTS STATE LAW CLAIMS CHALLENGING MEDICALLY-BASED ELIGIBILITY DETERMINATIONS.

The real issue, therefore, is which of four currently pending petitions should be used to clarify whether and how ERISA preempts state law claims challenging medically-based eligibility determinations. For several reasons, the Court may prefer to use this petition.

The pending *Conover* petition (No. 02-1864) is plainly an unsuitable vehicle. The petition barely discusses the preemption issue raised here, and the case itself primarily concerns whether bad faith claims are excepted from preemption under ERISA's insurance savings clause, § 514(b)(2)(A). *Conover* Opp'n 14-17. There is, however, no conflict among the lower courts on this issue. *Id.* 17-18.

As among the *Calad* (No. 03-83), *Davila* (No. 02-1845), and *Cicio* petitions, all three are worthy of review under this Court's standards for granting *certiorari*. But, the Court may prefer to review this petition.

The decision below clearly elucidates the issues for review, particularly insofar as this Court's decision in *Pegram* is responsible for the lower court confusion. The Second Circuit's decision openly acknowledges the split that has arisen in *Pegram*'s wake, and both the majority and dissenting opinions analyze *Pegram* in depth. *See* Pet. App. 24a-35a; *id.*

37a-43a (Calabresi, J., dissenting). The Fifth Circuit's *Roark* decision, from which the *Calad* and *Davila* petitions arise, does not. As one respected commentator (who also happens to be counsel of record for the *Calad* petitioner) has observed, "*Pegram* was somewhat relegated to being mood music in *Roark*, [but] the same cannot be said for *Cicio* . . . , which squarely held that *Pegram* had changed the complete preemption analysis." R. Eccles & D. Gordon, 11 ERISA Litig. Rptr. 14, 17 (Apr. 2003). That commentator correctly goes on to note that "*Cicio* contains the meatiest discussion of these [preemption] issues . . . ." *Id.* at 23.

In addition, through this petition the Court can fully resolve the preemption question dividing the lower courts. As noted above and in the petition, the lower courts have split into four different camps on the preemption issue, because they disagree *both* about whether state law claims challenging medically-based eligibility determinations are preempted and, if so, about the source and scope of that preemption. Pet. 10-18. As respondent acknowledges (Opp'n 3-4), the court below held that neither § 502 nor § 514 of ERISA preempts such state law claims—and this petition challenges both conclusions. In contrast, the Fifth Circuit *Roark* decision held that only § 514, and not § 502, preempts such claims; and the *Davila* and *Calad* petitions present only the § 502 issue. Thus, only this petition allows the Court to consider both of the issues creating the judicial confusion.

The *Davila* petitioner suggests (*Davila* Reply 9-10) that the § 502 issue must be resolved first anyway. But that is correct, if at all, only in the context of a federal-question removal petition, and not in the context of determining substantive preemption questions, as this Court's own decisions illustrate. *See, e.g.*, *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138-42 (1990) (deciding § 514 preemption issue before § 502 issue in state court action); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47-52 (1987) (deciding § 514 preemption before § 502 preemption in diversity action). Moreover, if the Court

were to conclude that § 502 does not completely preempt these state law claims, the Court would still need to decide whether § 514 of ERISA substantively preempts such claims, at least if it is fully to resolve the extant judicial confusion, as § 514 and § 502 have different scopes. *See generally Ingersoll-Rand*, 498 U.S. at 138-45 (separately considering preemption under § 514 and § 502). Only this petition would give the Court that opportunity.

The *Davila* petitioner attempts to sidestep this problem by suggesting (*Davila* Reply 9 n.4) that the Court could address "the Section 514 defense" after resolving the § 502 issue. But the *Calad* and *Davila* petitioners do not raise the § 514 issue in either the questions presented in or the bodies of their respective petitions for *certiorari*. Thus, under the Court's rules and practice, the Court would not address that issue. *See* Sup. Ct. R. 14.1(a); Stern & Gressman, *supra*, at 419-21.

Some arguments have been raised about why this petition may not be the preferred vehicle for resolving the split of authority. But those arguments are misplaced.

First, it makes no difference whether the underlying state law cause of action is based on a "statutory right of action" or state common law. Reply App. 6a n.2. This Court has repeatedly held that ERISA preemption rules apply equally to common law and statutory claims. *See, e.g., Ingersoll-Rand*, 498 U.S. at 139; *Pilot Life*, 481 U.S. at 48.

Second, it also makes no difference that the coverage decision at issue here concerns the "experimental" nature of a treatment rather than its "medical necessity." *Davila* Reply 10. As commentators have noted, either coverage issue is a "typical case in this area," Eccles, *supra*, at 22, and the benefit plan at issue here in fact includes both provisions. Pet. App. 78a. In any event, the distinction between "medical necessity" and "experimental" coverage determinations is irrelevant, because both kinds of determinations may involve medical judgment, and it is the presence of alleged medical

judgment—not the type of medical judgment—that drives the circuit conflict at issue.

Finally, it makes no difference that the court below remanded for the district court to decide "whether the complaint states a cause of action under the law of New York" and whether "*as a matter of fact*, . . . dismissal of the complaint is warranted." Pet. App. at 36a, 37a (emphasis in original). The critical point is that the court held that ERISA does not prevent a State from making actionable alleged medically-based eligibility determinations; and an additional important point is that this ruling of federal law conflicts with the judgments of other courts (and the Executive Branch) and has severe operational implications for employee benefit plans. That petitioners have *other* defenses available to them on remand does not change the importance of this threshold federal question or the utility of this case for deciding that question. Indeed, ERISA preemption questions are issues of law that, as here (and as in *Calad* and *Davila*), are routinely considered on motions to dismiss—even though additional legal and factual defenses can later be interposed. As this Court has recognized, early resolution of this preemption question is necessary to avoid burdening employee benefit plans with inappropriate litigation. *See Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 363-64 (2002); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 94-95 (1983).

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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No. 02-1826

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT ROARK, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF HIS DECEASED WIFE, GWEN ROARK,
Petitioner,

v.

HUMANA INC., HUMANA HEALTH PLAN OF TEXAS, INC. (D/B/A HUMANA HEALTH PLAN OF TEXAS (DALLAS), HUMANA HEALTH PLAN OF TEXAS (SAN ANTONIO), AND HUMANA HEALTH PLAN OF TEXAS (CORPUS CHRISTI)), AND HUMANA HMO TEXAS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PETITIONER

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REASONS FOR GRANTING THE WRIT

* * *

Supreme Court Rule 10 provides that a "petition for a writ of certiorari will be granted only for compelling reasons." The petitioner's brief has already described the conflict between the Fifth Circuit's decisions in *Corcoran v. United Healthcare*, 965 F.2d 1321 (5th Cir. 1992), *cert. denied*, 506 U.S. 1033 (1992), and this case which follows *Corcoran*, and the Second Circuit's decision in *Cicio v. Does*, 321 F.3d 83, 100 (2d Cir. 2003), *petition for cert. filed sub nom. Vytra Healthcare v. Cicio*, [03-69] (U.S. July 11, 2003) which distinguishes *Corcoran* as having been "decided before the Supreme Court's recent retrenchment of ERISA preemption's margins, and before the Court . . . in *Pegram* . . . addressed . . . medical malpractice actions against those engaged in medical decision making." So this brief will not belabor that point. Instead, AARP urges the Court grant the petition because it can settle an important question of federal law which determines the legal accountability for the millions of health care treatment decisions routinely made by MCOs.

* * *

The Court has the opportunity to bring certainty to this issue that plagues so many lower courts.[11] While AARP obviously believes that ERISA should not be interpreted to make managed care entities immune from liability where they have caused grievous injury by negligently denying care, no matter the Court's final conclusion, AARP believes it is

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[11] *See, e.g., Pryzbowski v. U.S. Healthcare, Inc.*, 245 F.3d 266 (3d Cir. 2001); *Bast v. Prudential Ins. Co. of Am.*, 150 F.3d 1003 (9th Cir. 1998); *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482 (7th Cir. 1996); *Pappas v. Asbel*, 768 A.2d 1089 (Pa. 2001).

incumbent upon the Court to sort out federal jurisprudence in such a way to bring consistency to the interpretation of federal law. The development of the law has reached the point that a definitive answer is needed.

CONCLUSION

For the above reasons, AARP urges the Court to grant the petition for a writ of certiorari.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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REASONS WHY THE PETITION SHOULD BE GRANTED

The Fifth Circuit's decision conflicts with this Court's recent opinions narrowing the breadth of ERISA preemption and squarely contradicts a recent decision by the United States Court of Appeals for the Second Circuit on the same important matter.[2] Numerous other federal circuits have divided on this issue, both actually and in principle, and decisions from a number of state courts conflict as well. Laws similar to the Texas statute at issue here have been passed in nine other states. Several more state courts of last resort permit such claims as a matter of common law. As a result, this issue will continue to arise throughout the country, absent guidance from this Court. Finally, the United States has advocated to this Court previously that this is an issue of national importance which should be addressed.

This issue affects the health care coverage of tens of millions of Americans. The conflict in the lower courts creates uncertainty, inconsistency and inefficiency in the judicial branches of the state and federal governments. These are reasons enough to grant Mr. Roark's petition.

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[2] That case, *Cicio v. Does*, 321 F.3d 83 (2d Cir. 2003), has also prompted a petition for writ of certiorari, which was filed on July 11, 2003. That petition highlights the importance of the question presented by Mr. Roark. *Amici* believe that this case is a more appropriate vehicle for addressing the issues presented in these petitions in part because the Texas legislature has clearly created a statutory right of action. Petitions have also been filed in *Roark*'s companion cases in the Fifth Circuit, *Cigna Healthcare of Texas v. Calad*, No. 03-83, and *Aetna Health Inc. v. Davila*, No. 02-1845, which also construe the Texas statute at issue here but which were decided solely on ERISA § 502(a)(1)(B) "complete preemption" grounds.

* * *

CONCLUSION

For all the foregoing reasons, the petition should be granted.

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

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SUMMARY OF THE ARGUMENT

Traditionally, States have been the primary protectors of the public health and welfare. The Court has, on many occasions, noted the historic state function of regulating health care. Moreover, since it issued *Travelers* in 1995, it has expressly recognized that Congress did not intend to supplant state law regarding health care in enacting ERISA.

Nonetheless, because it perceived itself to be bound by prior circuit precedent, the panel below followed the Fifth Circuit's earlier decision in *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321 (CA5 1992), to hold that a claim under a Texas statute requiring that HMO health care decisions regarding medical necessity be executed using ordinary care was preempted by ERISA. The panel's decision is in direct conflict with the Second Circuit's decision in *Cicio v. Does*, 321 F.3d 83 (CA2 2003), construing a similar New York law.

* * *

The Court should grant the petition for writ of certiorari to resolve the conflict between the circuits and to clarify the bounds of ERISA preemption in this area of traditional state regulation.

* * *

The Second Circuit, the Pennsylvania and Florida Supreme Courts, and the Ninth Circuit in a related FEHBA case have all reached the correct result. State efforts to regulate the provision of health care by requiring HMO medical-necessity decisions to be executed using ordinary care, and the creation of a malpractice claim to redress injury caused by a failure to abide by that standard, should not be swept into—and thus invalidated by—ERISA preemption. The Fifth Circuit's opinion at issue here conflicts with those decisions and is out of step with this Court's evolving ERISA jurisprudence

respecting the States' fundamental power to regulate health care.

CONCLUSION

The Court should grant the petition for writ of certiorari.

IN THE
SUPREME COURT OF THE UNITED STATES

No. 02-1845

AETNA HEALTH, INC.,

Petitioner,

v.

JUAN DAVILA,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

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BRIEF OF THE AMERICAN ASSOCIATION OF HEALTH PLANS, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN BENEFITS COUNCIL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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* * *

REASONS FOR GRANTING THE PETITION

* * *

This Court should grant the petition to make clear what seems obvious—the *Pegram* Court was analyzing a treating physician making a *direct treatment decision* with respect to a patient. The Court was not analyzing the action of an ERISA fiduciary acting in an administrative capacity. And the *Pegram* Court had "no occasion" to address the scope of preemption under ERISA sections 514 and 502 with respect to such claims decisions even when such decisions are alleged to involve some medical judgment. *Id.* at 229, n.9. But *Davila* reflects the Fifth Circuit's judgment that *Pegram* overrules *Pilot Life* and *Taylor*. Instead, the Fifth Circuit should have followed the settled principle that the Court does "not normally overturn, or so dramatically limit, earlier authority *sub silentio*." *See Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 3 (2000).

* * *

CONCLUSION

The petition for writ of certiorari should be granted.